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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. ~~72-~~ 1233

TEXAS MORTGAGE COMPANY,
Petitioner,

v.

PHILLIPS PETROLEUM COMPANY, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PHILLIPS PETROLEUM COMPANY, ET AL.,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Texas Mortgage Company, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on December 11, 1972.

OPINIONS BELOW

The opinion of the Court of Appeals (page 1a, infra) has not yet been reported. The opinion of the District Court for the Southern District of Texas is reported at 329 F. Supp. 579 (1971).

JURISDICTION

The judgment of the Court of Appeals was entered on December 11, 1972. Petition for Rehearing, filed on or about December 21, 1973, was overruled on January 5, 1973. Jurisdiction is invoked under 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

Whether, in a diversity case, an outcome-determinative State rule of procedure, embodying principles of State real property law, specifying the relief to be granted in an action for title and possession of land, must be followed by the federal courts.

STATUTORY AND RULES PROVISIONS INVOLVED

This case involves Rule 804 of the Texas Rules of Civil Procedure; 28 U.S.C. § 1652, and Rule 54(c) of the Federal Rules of Civil Procedure, as follows:

Rule 804.

"Upon the finding of the jury, or of the court where the case is tried by the court, in favor of the plaintiff for the whole or any part of the premises in controversy, the judgment shall be that the plaintiff recover of the defendant the title or possession, or both, as the case may be, of such premises, describing them, and where he recovers the possession, that he have his writ of possession."

28 U. S. C. § 1652.

"The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

Rule 54(c)

"A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the

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relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

STATEMENT OF THE CASE

This is an action in trespass to try title (the Texas action for title and possession of land) brought originally by Petitioner in the District Court of Brazoria County, Texas, and removed by Respondent, because of diversity, to the United States District Court for the Southern District of Texas, Galveston Division. The action was based upon the unauthorized, wilful trespass of Phillips Petroleum Company onto land owned by Petitioner, and the construction thereon by Phillips of a pipeline. Title and possession of the land were sought as well as damages for the diminution in value of the land caused by the trespassory tort of Phillips Petroleum. Trial was had to a jury on special interrogatories answered favorably to Petitioner. The United States District Judge entered his opinion (infra, page [illegible]), holding that the entry of Phillips Petroleum onto Petitioner's land and the construction of a pipeline thereon was without right, constituting a trespass. Initial judgment was entered, however, only for damages, the judge apparently being influenced by a *pendite lite* conveyance by Petitioner to the State of Texas under threat of condemnation.[1] Although Petitioner filed motions to alter and amend the judgment to provide for recovery of title and possession of the land, judgment was entered without inclusion of such provision. Appeal by Petitioner to the United States Court of Appeals for the Fifth Circuit on such point (and cross-appeal by the Phillips companies on the question of the right to enter and construct the pipeline) resulted in complete affirmance of

[1] For showing that such conveyance could have no effect on the outcome of the case, see footnote 3 herein, page [illegible].

the lower court's judgment, rejecting Petitioners contention that the determination that Phillips Petroleum was a trespasser necessitated, under Texas real property law, entry of judgment for title and possession.

REASONS FOR GRANTING WRIT

The question presented has both federal and State implications of importance. The Court of Appeals has decided the case in conflict with applicable State law. It has also decided the case contrary to or inconsistent with applicable decisions of this Court. Under both circumstances it has failed to follow the proper procedural standards for the application of state law or rules to decisions in the federal courts, and has, thus, departed from the accepted and usual course of judicial proceedings and countenanced such a departure by the District Court.

1. Conflict With State Law.

Rule 804, quoted previously, is one of a series of rules and statutes pertaining to the State-created action of trespass to try title, and is an integral part of such action.[2] It specifically and in mandatory language requires that judgment in such action, where the plaintiff prevails, ". . . shall be that the plaintiff recover of the defendant the title or possession, or both, as the case may be, of such premises, . . ." Both the District Court and the Court of Appeals, although "finding in favor of the plaintiff" on the question of title (and appurtenant possession), failed to enter the judgment required by the rule.

The rule is clear. The prevailing plaintiff *must* be given judgment for title and possession. The rule, however, does not appear ever to have been construed by a Texas court.

[2] Rules 783-809 of the Rules and Articles 7364, 7375, 7389, 7391, 7399, 7401, Texas Civil Statutes. Rule 804 is former Article 7388, unchanged.

Notwithstanding, the proper rule of construction of such mandatory language is manifest: any court obligated to follow Texas rules *must* enter judgment in a trespass to try title case in accordance with the Rule.[3]

2. Conflict With Decisions of This Court.

The decision below conflicts with decisions of this Court both with respect to the application of 28 U.S.C. § 1652 and the *Erie* rule as well as principles announced even prior to *Erie* concerning the application of state real property principles in actions in the federal courts. As said in *Hinde* v. *Vattier*, 30 U. S. (5 Pet.) 398 (1831):

> "There is no principle better established and more uniformily adhered to in this court, than that the circuit courts, in deciding on titles to real property in the different states, are bound to decide precisely as the state courts ought to do . . . The rules of property and of evidence, whether derived from the laws or adjudications of the judicial tribunals of a state, furnish the guides and rules of decision in those of the Union in all cases to which they apply, where the Constitution, treaties or statutes of the United States do not otherwise provide."

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[3] Both the District Court and Court of Appeals were misled concerning the effect of a conveyance by Petitioner, *pendite lite*, under threat of condemnation, to the State of Texas; but it is abundantly clear that under Texas law such conveyance could have no effect on the outcome of the case. *It is the state of the title at the commencement of the action which is determinative.* This proposition is amply determined and supported by *Lee* v. *Salinas*, 15 Tex. 495 (1855); *Hearne* v. *Erhard*, 33 Tex. 61 (1870); *Mealy* v. *Lipp*, 91 Tex. 182, 42 S.W. 544 (1897); and *Smith* v. *Olsen*, 92 Tex. 181, 46 S.W. 631. Although the Court of Appeals erroneously construed the reservation in the deed from Petitioner to the State (failing to give effect to the first paragraph), it should not have construed the deed at all! Under the above cases, since a conveyance (*a fortiori*, a reservation) could have *no effect* on the case, its provisions are completely immaterial.

See also, *Edward Hines Trustees* v. *Martin,* 268 U. S. 458 (1925).

In addition, this court held in *Thompson* v. *Magnolia Petroleum Co.,* 309 U.S. 478 (1940) that state law is supreme in the determination of rights in local property, and that federal court decisions contrary to state law cannot be allowed merely "by the accident of federal jurisdiction." Although there is apparently no decision by a Texas court specifically holding that Rule 804 (or its identical statutory predecessor, former Article 7388) *requires* entry of judgment in accordance with its terms, there is no ambiguity or doubt about the meaning of the rule and it is clearly part of a comprehensive system of rules and statutes governing suits for title and possession of land. It is, moreover, (in addition to having a statutory basis) a rule promulgated by the Supreme Court of Texas pursuant to its authority to provide rules of procedure in civil actions in the State of Texas.

The federal statute applying state laws as rules of decision (28 U.S.C. § 1652), *Erie Railroad,* and an unbroken line of cases for over one hundred forty years require entry of judgment in accordance with Rule 804 of the Texas Rules.

3. Failure to Follow Proper Procedural Standards.

It is only "by the accident of federal jurisdiction, *Thompson* v. *Magnolia Petroleum Co.,* supra, that these Texas real property questions are before the federal courts. This court has repeatedly confirmed the policy announced in *Guaranty Trust Co.* v. *York,* 326 U. S. 99 (1945), that ". . . the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State Court."

Unquestionably the mandate of Rule 804 is outcome-determinative — a failure to apply it is effectively to deny the specific recovery to which the prevailing party is mandatorily entitled. Not to apply it leaves the title to land unadjudicated in a case in which the determination of title is the primary goal. Moreover, a failure to grant the only relief for which the rule provides is not only to deny that to which the plaintiff is entitled, but it may be construed to be a "take nothing" judgment as to title (since plaintiff placed its title in jeopardy and failed to receive judgment confirming title), *the effect of which is to adjudicate title in the defendant! Federal Land Bank* v. *Brooks,* 143 S.W. 2d 928 (Tex. Sup. 1940). Clearly no such construction should be fostered where Phillips Petroleum is authoritatively determined to have been a trespasser!

The only limitation on the application of the outcome-determinative test is the presence of some countervailing Federal consideration. *Byrd* v. *Blue Ridge Rural Coop,* 326 U. S. 525 (1958), *Hanna* v. *Plumer,* 380 U. S. 460 (1965). None is perceived here. What is presented is an opportunity to define the correlation between Rule 54(c) of the Federal Rules, providing in part that ". . . every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled . . ." and a state rule which specifies the relief to be granted. That the state rule concerns principles of real property law makes it all the more imperative that such correlation be precisely delineated.

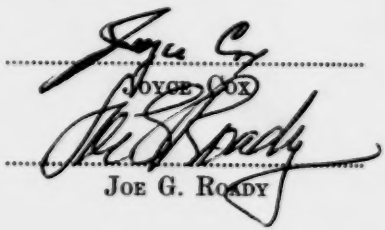
In *Hanna* v. *Plumer,* supra, Chief Justice Warren, writing for the Court, noted the twin aims of the *Erie* rule upon which the outcome-determinative test is based: "discouragement of forum-shopping and avoidance of inequitable administration of the laws." It has been observed herein

that the decisions of the District Court and Court of Appeals, in failing to apply a clearly applicable state rule, reach an outcome which is a misapplication, and therefore an inequitable administration of Texas land law. It must be further observed that the decisions below also result in the encouragement of forum-shopping by corporations such as Phillips Petroleum which, although having extensive real property interests and involvements in Texas (and other states), have neither *de jure* residence nor principal place of business in Texas. The "accident of federal jurisdiction" should not result in an outcome which would be different from the result plainly required in the Texas courts nor should such "accident" allow the denial of a substantial real property right — the right to have established the owner's title and right of possession as against a trespasser — accorded by the State of Texas to landowners within its borders. Non-resident trespassers should not be able to achieve in the federal courts, by forum-shopping, a result which they could not achieve in the state court.

CONCLUSION

PREMISES CONSIDERED, Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,



JOYCE COX

JOE G. ROADY

CERTIFICATE OF SERVICE

I hereby certify that service of three (3) copies of the foregoing Petition for Writ of Certiorari was made on counsel for Respondents, E. H. Brown, by depositing the same in a United States post office mail box, with first class postage prepaid, addressed to said counsel at P. O. Box 1967, Houston, Texas, 77001, this 6th day of March, 1973.

Joe G. Roady

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1972

No. 72-1593

D. C. DOCKET NO. CA 67-G-19

TEXAS MORTGAGE COMPANY,
Plaintiff-Apellant-Cross Appellee,

v.

PHILLIPS PETROLEUM COMPANY and
PHILLIPS PIPE LINE COMPANY,
Defendants-Appellees-Cross Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

Before: COLEMAN, AINSWORTH and DYER,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in both the main appeal and cross appeal be, and the same is hereby affirmed.

It is further ordered that plaintiff-appellant-cross appellee pay to defendants-appellees-cross appellants the costs on appeal to be taxed by the Clerk of this Court.

December 11, 1972

Issued as Mandate: January 15, 1973

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-1593

TEXAS MORTGAGE COMPANY,
Plaintiff-Appellant-Cross Appellee,

v.

PHILLIPS PETROLEUM COMPANY and
PHILLIPS PIPE LINE COMPANY,
Defendants-Appellees-Cross Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

(December 11, 1972)

Before COLEMAN, AINSWORTH and DYER, Circuit Judges.

COLEMAN, Circuit Judge: The plaintiff-appellant says:

"The sole issue presented by plaintiff-appellant, Texas Mortgage Company, is whether the District Court erred in refusing to grant judgment decreeing the title and right of possession of Texas Mortgage Company as against Phillips Petroleum Company and Phillips Pipe Line Company to the land in controversy in plaintiff's action in trespass to try title."

The appellees have cross appealed. They argue that plaintiff-appellee should not have been awarded money damages for the construction, over objection, of a second

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pipeline across property which the plaintiff formerly owned but which, during the progress of the litigation, had been conveyed to the State of Texas, reserving the right to pursue the lawsuit.

We affirm on both direct and cross appeals.

We think we may best describe the facts and the issues by setting forth, *in haec verba,* the memorandum opinion of the District Court:

MEMORANDUM AND ORDER

The seeds of this lawsuit were sown in 1956, when two groups of cotenants, each owning an undivided one-half interest in a single tract of land, made differing and partially inconsistent pipeline right-of-way grants or easements to the same third party. The courts of the State of Texas have not been confronted with this exact situation and therefore have not passed upon the controlling point of law.

On January 25, 1956, one group of cotenants, which shall be referred to as the Korge group, owners of an undivided one-half interest in the tract of land, granted to Phillips *Pipeline* Company (hereinafter called Phillips Pipe) the right to construct a *single* pipeline across the subject land. Two days later, another group of cotenants, to be called the Turner group, owners of the other undivided one-half interest in said land, granted to the Phillips *Petroleum* Company (hereinafter called Phillips Pet) the right to lay a pipeline or *pipelines* across the land.

In 1956, subsequent to the aforementioned grants, Phillips Pipe constructed a single line which was not then challenged and is not here in issue. Later that year, the plaintiff, M. W. Lee, acquired the Turner one-half interest. Early in 1957, he also purchased the Korge one-half interest. In 1961, Lee conveyed the property to the Texas Mortgage Company which, sub-

sequent to the filing of this suit, conveyed the land to the State of Texas for use as a prison farm.[1]

Approximately ten years after his initial purchase Lee received a letter from Phillips Pet[2] indicating a desire on the part of that corporation to construct an additional pipeline and suggesting negotiations to resolve the asserted uncertainties resulting from the difference in terms of its two easement grants. This overture being unproductive, Phillips Pet ultimately communicated to Lee its intention to rely upon its claimed easement rights under the Turner grant. Over plaintiff's objection, Phillips Pet entered the land and constructed the additional pipeline at a location of its choice. Plaintiff thereupon filed this action in trespass to try title in the District Court of Brazoria County, Texas, alleging its ouster and trespass to establish its title and right to possession and to recover damages for the trespass. The suit was removed to this Court where jurisdiction exists by reason of diversity of citizenship. 28 U.S.C. § 1331.

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[1] This conveyance to the State does not deprive plaintiffs of standing to sue because they seek to recover for damages done to the land when they owned it, and which obviously were reflected in diminution of the land's value when conveyed to the State. C. A. Wright, *Law of Federal Courts* § 13 (2d ed. 1970). Likewise, the transfer of the land did not divest the Court of diversity jurisdiction. C. A. Wright, supra § 28.

[2] Phillips Pipeline Company, the grantee of the Korge easement, was a wholly owned subsidiary of Phillips Petroleum Company, grantee of the Turner easement. On the instant record, it is unnecessary to decide whether the Pipeline Company is for all purposes a mere instrumentality of the Petroleum Company. See *Williams* v. *Freeport Sulphur Company*, 40 S.W.2d 817 (Tex. Civ. App. — Galveston 1930, no writ); cf. *Kirby Lumber Corp.* v. *Karpel*, 233 F.2d 373 (5th Cir. 1956); *McDaniel Bros.* v. *Wilson*, 70 S.W.2d 619, 621 (Tex.Civ.App. — Beaumont 1934, writ ref'd). Suffice it to say that for the purpose of the relevant transaction — the purchase of the two easements — it is obvious that the corporations acted in concert and as a single entity. In essence, Phillips Pipe and its employees acted as the agents of Phillips Pet in this undertaking. The jury so concluded, and also found that both easements were acquired for the benefit of Phillips Pet.

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Thereafter, the cause was tried and the facts were submitted to a jury on eleven special interrogatories, Rule 49(a), Fed.R. Civ.P., which, together with the jury's answers, are set out in full in the appendix. The jury's answers were consistent and cast defendants in liability.

Both parties thereafter filed motions concerning the jury's verdict. Plaintiffs moved for its adoption and the entry of judgment thereon. Defendants likewise moved for judgment contending that the verdict was, in effect, a legal nullity. Defendant's legal contentions are discussed below.

If Phillips Pet had no legal right to construct the second pipeline in 1966, plaintiffs are entitled to recover their damages sustained by reason of that action. The Court concludes that defendants acted unlawfully, and that judgment must enter upon the jury's verdict in favor of plaintiffs.

At no time during the Turner-Korge cotenancy did the defendants enjoy the right to construct more than a single pipeline across the property. It is well settled that a tenant in common cannot, without the precedent authority or subsequent ratification of his cotenants, impose an easement or dedication upon the common property in favor of a third party. *Heilbron* v. *St. Louis South Ry. Co. of Texas*, 113 S.W. 610 (Tex.Civ.App. — 1908, no writ); *Chenoweth Bros.* v. *Magnolia Petroleum Co.*, 129 S.W.2d 446, 447 (Tex. Civ. App.—Dallas 1939, writ dismd. jdgmt, corr.); *Clapp* v. *Atwood*, 16 N.E.2d 67 (Mass. Sup. Ct. 1938); *Benjamin* v. *American Telephone & Telegraph Co.*, 82 N.E. 681 (Mass. Sup. Ct. 1907); 15 Tex.Jur.2d *Cotenancy* § 13, n. 6; 86 C.J.S. *Tenancy in Common* § 111, 20 Am.Jur.2d *Cotenancy and Joint Ownership* § 103; 1 H. T. Tiffany, *Real Property* § 199, p. 654 (2d ed. 1930). Implicit in this is the principle that a tenant in common cannot effectively grant to a third party an easement conferring a greater liberty, privilege, or advantage than that granted by his cotenants. *Id.*

The grant of the multiple-line easement by the Turner group of cotenants to Phillips Pet would have "become valid and effective for the purpose of binding the grantor, if supplemented by exactly similar grants to the same person from the other cotenants. . . ." 1 H. T. Tiffany, supra, at p. 685. However, the Turner grant was never exactly supplemented. Instead, the only precedent authority from the Korge group of cotenants was the single-line grant which the jury found was intended by the parties to limit the owner of that grant to the construction, maintenance and operation of only one pipeline. Therefore, while the Turner-Korge cotenancy existed, the unsupplemented Turner multiple-line easement was ineffective to grant to Phillips Pet the right to construct more than a single pipeline over said land. The Korge grant having been restricted in unambiguous language to construction of a single pipeline by Phillips Pipe, its assigns, as well as Phillips Pet, were likewise so restricted. *Id.*

Thereafter, when Lee acquired the Turner group's interest and was briefly a cotenant with the Korges, and even later, after he acquired the Korge group's interests in the land — merging the fee title into himself — his title was not subject to the multiple-line easement which the Turners had granted to Phillips Pet. The Turner multiple-line grant, although in the plaintiff's chain of title, gave no more rights to defendants after title was merged than before. *Benjamin* v. *American Telephone & Telegraph Co.,* supra; *see also: Clapp* v. *Atwood,* supra.[3] In sum, the union of cotenants' interests in a single title terminates the cotenancy, but does not by itself alter, enlarge, or diminish the rights of third persons which were conferred during the cotenancy. *Id.*

When W. M. Lee purchased the combined rights of the Turner and Korge groups in the land, he pur-

[3] No Texas decisions on this point have been found. The logic of the authorities cited above persuades this Court that the Texas courts would follow them in an appropriate case and therefore they are adopted here. *See:* C. A. Wright, supra, at § 58.

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chased their respective interests subject to whatever rights had been granted to defendants by them, and was estopped to deny the validity of whatever rights or title defendants had so received. *Green* v. *White* 137 Tex. 361, 153 S.W.2d 575, 583 (1941); *Waco Bridge Co.* v. *City of Waco,* 85 Tex. 320, 20 S.W. 137 (1893); *U.S.A.* v. *1,078.27 Acres of Land, More or Less, Situated in Galveston County, Texas,* ..... F. Supp. ..... (Civil Action No. 2662) (S.D. Tex., January 23, 1970) (per Noel, J.), aff'd. ..... F.2d ..... (5th Cir., No. 29912, July 6, 1971). This estoppel, however, does not aid defendants here. As pointed out above, the inconsistent grants of the two different groups of cotenants failed to give defendants any vested right or title by which they could have placed a second pipeline upon the jointly owned land of the Turner and Korge cotenants. Therefore, the plaintiffs, standing in the shoes of the Korges, are entitled to assert the Korge group's right to oppose the construction of the second pipeline. *Clapp* v. *Atwood,* supra; *Benjamin* v. *American Telephone & Telegraph Co.,* supra; 2 Thompson, *Real Property* § 469, pp. 24-25 (Perm. ed. 1939).[4] As W. M. Lee and the mortgage company have asserted their objections, the defendants' unauthorized entry upon the land of another was a trespassory tort. *Pilcher* v. *Kirk,* 55 Tex. 208, 216 (1881).

In sum, as defendants failed to receive a multiple-line grant from the Korge cotenants, the multiple-line grant which Phillips Pet did receive from the Turner group was ineffective to bind the *joint* estates of the two sets of grantors. For all practical purposes, the Turner grant was of no benefit to Phillips Pet at the time it installed the second line upon plaintiffs' land.

To avoid this result, defendants place reliance upon the doctrine of equitable partition, whereby cotenancies have been judicially dissolved in order to effectuate a grant by one cotenant to a third party. In this

[4] *See:* fn. 3 supra.

regard, it is apparently the contention of defendants that the theoretical availability of such a remedy in 1957 should improve their position today. However, "as a prerequisite to the right of equitable partition, the parties against whom the remedy is sought must be joint owners of the estate sought to be partitioned." *Thompson* v. *Whitfield*, 203 S.W.2d 268, 270 (Tex.Civ. App. — Texarkana 1947, writ ref'd, n.r.e.). *See also: Gilbreath* v. *Douglas*, 388 S.W.2d 279, 281 (Tex.Civ. App. — Amarillo 1965, writ ref'd., n.r.e.); *Luckel* v. *Barnsdall Oil Co.*, 74 S.W.2d 127, 131 (Tex.Civ.App. — Texarkana, 1934), aff'd sub nom. *Barnsdall Oil Co.* v. *Hubbard*, 130 Tex. 476, 109 S.W.2d 960 (1937). To the extent that partition might have been available to protect defendants' interest under the Turner easement, see *Saulsberry* v. *Saulsberry*, 121 F.2d 318 (6th Cir. 1941), this remedy clearly became unavailable when the Turner and Korge titles merged in Lee, thus terminating the requisite joint ownership nine years before the instant controversy arose. Cf. *Corn* v. *First Texas Joint Stock Land Bank*, 131 S.W.2d 752 (Tex.Civ. App. — Ft. Worth 1939, writ ref'd).

In any event, the facts of the instant case do not suggest the propriety of equitable relief in behalf of defendants. The typical case in which partition will be utilized to protect a grantee involves grants which were of a character to suggest that the interest conveyed was exclusive title to a strip, parcel, or easement, whether or not it was described by metes and bounds. Cf. Annot., *Grant by Cotenant — Partition*, 77 A.L.R.2d 1377 (1961). In the instant case, however, Phillips Pet created this predicament with open eyes, having notice of the existence of the two undivided interests at the time that it and its subsidiary, Phillips Pipe, procured inconsistent easements. Defendants actual knowledge of the inconsistency was clearly evidenced by their attempt to clarify Phillips Pet's rights prior to its unilateral installation of an additional pipeline in 1966. Therefore, having purchased the easement from the Turner group with full knowledge that the grantor

was purporting to convey title to a multiple-line easement only as to an undivided one-half interest in said land, and having acted in reliance upon that grant with full knowledge of its limitations, and after seeking, but having been refused, an enlargement of the multiple-line grant to cover the Korge undivided one-half interest, defendants have sullied their hands and are now in no position to enjoy the belated and somewhat hypothetical assistance of equity. Cf. *Humphreys-Mexia Co.* v. *Arseneau*, 116 Tex. 603, 297 S.W. 225 (1927); *Frost* v. *Wolf*, 77 Tex. 455, 14 S.W. 440, 443 (1890); *Bartlett* v. *Terrell*, 292 S.W. 273 (Tex.Civ.App. — San Antonio 1927, writ ref'd.).

Accordingly, it is Ordered that:

(1) Judgment for plaintiffs shall be entered on the jury's answers to the aforementioned interrogatories.

(2) The Clerk shall file this instrument and send copies to counsel of record.

DONE at Houston, Texas, this 26th day of July, 1971.

JAMES NOEL
JUDGE

This resulted in a judgment for Texas Mortgage in the sum of $4,000 for damages to the 160 acres across which the second line was installed plus interest from September 26, 1966, the date the suit was filed.

The Contentions of the Parties

The direct appeal asserts that the District Court erred when it declined to decree in favor of Texas Mortgage Company "the title to and possession of the land" [on which the second line was built] as against the Phillips Companies.

The appellees respond that, "Texas Mortgage, having been awarded damages herein for the taking of an ease-

ment, may not also have judgment denying existence of the easement", especially since Texas Mortgage, in its Complaint, prayed for judgment for title and possession or *alternatively* for damages for that taken by the defendants and as diminution in value of the remainder.

Appellant answers this with the contention that the jury finding and judgment thereon measured only the damages for the trespass to the land and included nothing for the value of that actually taken.

The Decision Here

We may begin the resolution of these contentions from a point of beginning which is accepted by both sides.

In Texas, a conveyance *pendente lite* does not terminate the litigation, but any judgment thereafter rendered is for the benefit of the purchaser *pendente lite*, *Smith* v. *Olson*, 92 Tex. 181, 46 S.W. 631 (1898). In that case it was held:

> "* * * It is a well settled rule that, where the interest of either party to a suit is purchased after its commencement, the purchaser stands in the shoes of the party whose title has been conveyed to him; and the alienation pendente lite does not affect the progress or determination of the litigation. If the party who has conveyed his interest succeed in the litigation, judgment inures to the benefit of his grantee. Hence, where the title of the plaintiff is conveyed while the suit is in progress, it proceeds in his name for the benefit of the purchaser."

On the face of it, then, the litigation had to proceed for the benefit of the State of Texas. The State, however, declined to intervene in the litigation.

The distinguishing point is that when Texas Mortgage Company conveyed the tract to the State of Texas on May

3, 1967 [under threat of condemnation], after the suit had been filed on September 26, 1966, the instrument of conveyance contained the following reservation:

> "Grantor's right to sue and recover for any and all residual damage to the market value of the remainder of said Tract No. 1 occasioned by construction of said pipeline or pipelines shall in no way be affected by this conveyance. Grantor reserves the right to prosecute or settle *said cause of action* (italics ours) to the same extent that it could prosecute or settle had this conveyance not been made."

It inevitably follows that the rights of Texas Mortgage must be measured by the terms of its *reservation.*

The first sentence reserved the right "to sue and recover for any and all residual damage to the market value of the remainder of said Tract No. 1 occasioned by construction of said pipeline or pipelines".

There can be no doubt that by the judgment of the District Court the purpose of this reservation has, in fact, been accomplished.

This leaves only the second sentence of the reservation: "the right to prosecute or settle said cause of action to the same extent that it could prosecute or settle had this conveyance not been made".

It seems clear to us that this second sentence, of necessity, refers to the "cause of action" as it appeared in the immediately preceding sentence, to-wit, "any and all residual damage to the market value of the remainder * * * * occasioned by construction of said pipeline or pipelines".

As stated, this is exactly what the judgment of the District Court accomplished.

We are especially led to this view by the fact, which the parties well knew, that the Korge conveyance of January 25, 1956, had already conveyed a thirty foot easement across the property for "a twelve inch (12") pipeline" and the Turner conveyance of January 27, 1956, had conveyed an easement for one or more pipelines, without limiting the width of the easement.

The basis for the action was that Phillips had constructed a second pipeline (as to ½ of the predecessor title) where only one had been authorized.

In any and all events, Phillips was already the owner of an easement of not less than thirty feet in width. There is no indication that the second pipeline was located outside that thirty foot strip.

The sole cause of action was that Phillips had constructed a second pipeline (as to ½ of the predecessor title) where only one had been authorized. *Phillips had simply misused an existing easement.*

For this, Texas Mortgage has recovered its damages within the clear meaning of its reservation. This is all that it reserved the right to do.

We therefore conclude that there was no error as to the remedy granted the plaintiff-appellant.

As to the cross appeal, Phillips contends that it had the right under the original easements to construct the additional line. We agree with the District Court that it did not.

AFFIRMED on both direct and cross appeals.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-1593

TEXAS MORTGAGE COMPANY,
Plaintiff-Appellant-Cross Appellee,

v.

PHILLIPS PETROLEUM COMPANY and
PHILLIPS PIPE LINE COMPANY,
Defendants-Appellees Cross Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

(January 5, 1973)

ON PETITION FOR REHEARING

Before: COLEMAN, AINSWORTH and DYER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

APPENDIX B

In The
UNITED STATES DISTRICT COURT
For the Southern District of Texas
Galveston Division

Civil Action No. 67-G-19

W. M. Lee and
Texas Mortgage Co.,

Plaintiffs,

v.

Phillips Petroleum Company and
Phillips Pipe Line Company,

Defendants.

Joe G. Roady and Frank G. Evans;
Cox, Evans, Pakenham & Roady; Houston, Texas;
for the plaintiffs.

E. H. Brown and Eugene C. Marshall;
Houston, Texas;
for the defendants.

MEMORANDUM AND ORDER

The seeds of this lawsuit were sown in 1956, when two groups of cotenants, each owning an undivided one-half interest in a single tract of land, made differing and partially inconsistent pipeline right-of-way grants or easements to the same third party. The courts of the State of Texas have not been confronted with this exact situation and therefore have not passed upon the controlling point of law.

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On January 25, 1956, one group of cotenants, which shall be referred to as the Korge group, owners of an undivided one-half interest in the tract of land, granted to Phillips *Pipeline* Company (hereinafter called Phillips Pipe) the right to construct a *single* pipeline across the subject land. Two days later, another group of cotenants, to be called the Turner group, owners of the other undivided one-half interest in said land, granted to the Phillips *Petroleum* Company (hereinafter called Phillips Pet) the right to lay a pipeline or *pipelines* across the land.

In 1956, subsequent to the aforementioned grants, Phillips Pipe constructed a single line which was not then challenged and is not here in issue. Later that year, the plaintiff, M. W. Lee, acquired the Turner one-half interest. Early in 1957, he also purchased the Korge one-half interest. In 1961, Lee conveyed the property to the Texas Mortgage Company which, subsequent to the filing of this suit, conveyed the land to the State of Texas for use as a prison farm.[1]

Approximately ten years after his initial purchase, Lee received a letter from Phillips Pet[2] indicating a desire

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[1] This conveyance to the State does not deprive plaintiffs of standing to sue because they seek to recover for damages done to the land when they owned it, and which obviously were reflected in diminution of the land's value when conveyed to the State. C. A. Wright, *Law of Federal Courts* § 13 (2d ed. 1970). Likewise, the transfer of the land did not divest the Court of diversity jurisdiction. C. A. Wright, supra. § 28.

[2] Phillips Pipeline Company, the grantee of the Korge easement, was a wholly owned subsidiary of Phillips Petroleum Company, grantee of the Turner easement. On the instant record, it is unnecessary to decide whether the Pipeline Company is for all purposes a mere instrumentality of the Petroleum Company. See *Williams* v. *Freeport Sulphur Company*, 40 S.W.2d 817 (Tex. Civ. App. — Galveston 1930, no writ); cf. *Kirby Lumber Corp.* v. *Karpel*, 233 F.2d 373 (5th Cir. 1956); *McDaniel Bros.* v. *Wilson*, 70 S.W.2d 619, 621 (Tex.Civ.App — Beaumont 1934,

on the part of that corporation to construct an additional pipeline and suggesting negotiations to resolve the asserted uncertainties resulting from the difference in terms of its two easement grants. This overture being unproductive, Phillips Pet ultimately communicated to Lee its intention to rely upon its claimed easement rights under the Turner grant. Over plaintiff's objection, Phillips Pet entered the land and constructed the additional pipeline at a location of its choice. Plaintiff thereupon filed this action in trespass to try title in the District Court of Brazoria County, Texas, alleging its ouster and trespass to establish its title and right to possession and to recover damages for the trespass. The suit was removed to this Court where jurisdiction exists by reason of diversity of citizenship. 28 U.S.C. § 1331.

Thereafter, the cause was tried and the facts were submitted to a jury on eleven special interrogatories, Rule 49(a), Fed.R.Civ.P., which, together with the jury's answers, are set out in full in the appendix. The jury's answers were consistent and cast defendants in liability.

Both parties thereafter filed motions concerning the jury's verdict. Plaintiffs moved for its adoption and the entry of judgment thereon. Defendants likewise moved for judgment contending that the verdict was, in effect, a legal nullity. Defendants' legal contentions are discussed below.

If Phillips Pet had no legal right to construct the second pipeline in 1966, plaintiffs are entitled to recover their damages sustained by reason of that action. The Court

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writ ref'd). Suffice it to say that for the purpose of the relevant transaction — the purchase of the two easements — it is obvious that the corporations acted in concert and as a single entity. In essence, Phillips Pipe and its employees acted as the agents of Phillips Pet in this undertaking. The jury so concluded, and also found that both easements were acquired for the benefit of Phillips Pet.

concludes that defendants acted unlawfully, and that judgment must enter upon the jury's verdict in favor of plaintiffs.

At no time during the Turner-Korge cotenancy did the defendants enjoy the right to construct more than a single pipeline across the property. It is well settled that a tenant in common cannot, without the precedent authority or subsequent ratification of his cotenants, impose an easement or dedication upon the common property in favor of a third party. *Heilbron* v. *St. Louis South Ry. Co. of Texas,* 113 S.W. 610 (Tex.Civ.App — 1908, no writ); *Chenoweth Bros.* v. *Magnolia Petroleum Co.,* 129 S.W.2d 446, 447 (Tex.Civ. App. — Dallas 1939, writ dismd jdgmt. corr.); *Clapp* v. *Atwood,* 16 N.E.2d 67 (Mass. Sup.Ct. 1938); *Benjamin* v. *American Telephone & Telegraph Co.,* 82 NE 681 (Mass. Sup.Ct. 1907); 15 Tex.Jur.2d *Cotenancy* § 13, n. 6; 86 C.J.S. *Tenancy in Common* § 111, 20 Am.Jur.2d *Cotenancy and Joint Ownership* § 103; 1 H. T. Tiffany, *Real Property* § 199, p. 654 (2d ed. 1920). Implicit in this is the principle that a tenant in common cannot effectively grant to a third party an easement conferring a greater liberty, privilege, or advantage than that granted by his cotenants. *Id.*

The grant of the multiple-line easement by the Turner group of cotenants to Phillips Pet would have "become valid and effective for the purpose of binding the grantor, if supplemented by exactly similar grants to the same person from the other cotenants . . .", 1 H. T. Tiffany, supra., at p. 685. However, the Turner grant was never exactly supplemented. Instead, the only precedent authority from the Korge group of cotenants was the single-line grant which the jury found was intended by the parties to limit the owner of that grant to the construction, maintenance and operation of only one pipeline. Therefore, while the Turner-Korge cotenancy existed, the unsupplemented

Turner multiple-line easement was ineffective to grant to Phillips Pet the right to construct more than a single pipeline over said land. The Korge grant having been restricted in ambiguous language to construction of a single pipeline by Phillips Pipe, its assigns, as well as Phillips Pet, were likewise so restricted. *Id.*

Thereafter, when Lee acquired the Turner group's interest and was briefly a cotenant with the Korges, and even later, after he acquired the Korge group's interest in the land — merging the fee title into himself — his title was not subject to the multiple-line easement which the Turners had granted to Phillips Pet. The Turner multiple-line grant, although in the plaintiff's chain of title, gave no more rights to defendants after title was merged than before. *Benjamin* v. *American Telephone & Telegraph Co.*, supra; *see also: Clapp* v. *Atwood*, supra.[3] In sum, the union of cotenants' interest in a single title terminates the cotenancy, but does not by itself alter, enlarge, or diminish the rights of third persons which were conferred during the cotenancy. *Id.*

When W. M. Lee purchased the combined rights of the Turner and Korge groups in the land, he purchased their respective interests subject to whatever rights had been granted to defendants by them, and was estopped to deny the validity of whatever rights or title defendants had so received. *Green* v. *White*, 137 Tex. 361, 153 S.W.2d 575, 583 (1941); *Waco Bridge Co.* v. *City of Waco*, 85 Tex. 320, 20 SW 137 (1893); *U.S.A.* v. *1,078.27 Acres of Land, More or Less, Situated in Galveston County, Texas*, ... F.Supp. ..... (Civil Action No. 2662) (S.D. Tex., January 23, 1970)

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[3] No Texas decisions on this point have been found. The logic of the authorities cited above persuades this Court that the Texas courts would follow them in an appropriate case and therefore they are adopted here. *See:* C. A. Wright, supra, at § 58.

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(per Noel, J.), aff'd ..... F.2d ..... (5th Cir., No. 29912, July 6, 1971). This estoppel however does not aid defendants here. As pointed out above, the inconsistent grants of the two different groups of cotenants failed to give defendants any vested right or title by which they could have placed a second pipeline upon the jointly owned land of the Turner and Korge cotenants. Therefore, the plaintiffs standing in the shoes of the Korges, are entitled to assert the Korge group's right to oppose the construction of the second pipeline. *Clapp* v. *Atwood*, supra; *Benjamin* v. *American Telephone & Telegraph Co.*, supra; 2 Thompson, *Real Property* § 469, pp. 24-25 (Perm. ed. 1939).[4] As W. M. Lee and the mortgage company have asserted their objections, the defendants' unauthorized entry upon the land of another was a trespassory tort. *Pilcher* v. *Kirk*, 55 Tex. 208, 216 (1881).

In sum, as defendants failed to receive a multi-line grant from the Korge cotenants, the multi-line grant which Phillips Pet did receive from the Turner group was ineffective to bind the *joint* estate of the two sets of grantors. For all practical purposes, the Turner grant was of no benefit to Phillips Pet at the time it installed the second line upon plaintiff's land.

To avoid this result, defendants place reliance upon the doctrine of equitable partition, whereby cotenancies have been judicially dissolved in order to effectuate a grant by one cotenant to a third party. In this regard, it is apparently the contention of defendants that the theoretical availability of such a remedy in 1957 should improve their position today. However, "as a prerequisite to the right of equitable partition, the parties against whom the remedy is sought must be joint owners of the estate sought to be partitioned." *Thompson* v. *Whitfield*, 203 S.W.2d 268, 270 (Tex.Civ.App.—Texarkana 1947, writ ref'd, n.r.e.). *See*

[4] *See:* fn. 3 supra.

also: Gilbreath v. *Douglas,* 388 S.W.2d 279, 281 (Tex.Civ. App. — Amarillo 1965, writ ref'd., n.r.e.); *Luckel* v. *Barnesdall Oil Co.,* 74 S.W.2d 127, 131 (Tex.Civ.App—Texarkana, 1934), aff'd sub nom. *Barnsdall Oil Co.* v. *Hubbard,* 130 Tex. 476, 109 S.W.2d 960 (1937). To the extent that partition might have been available to protect defendants' interest under the Turner easement, see *Saulsberry* v. *Saulsberry,* 121 F.2d 318 (6th Cir. 1941), this remedy clearly became unavailable when the Turner and Korge titles merged in Lee, thus terminating the requisite joint ownership nine years before the instant controversy arose. Cf. *Corn* v. *First Texas Joint Stock Land Bank,* 131 S.W.2d 752 (Tex.Civ. App.—Ft. Worth 1939, writ ref'd).

In any event, the facts of the instant case do not suggest the propriety of equitable relief in behalf of defendants. The typical case in which partition will be utilized to protect a grantee involves grants which were of a character to suggest that the interest conveyed was exclusive title to a strip, parcel, or easement, whether or not it was described by metes and bounds. Cf. Annot., *Grant by Cotenant — Partition,* 77 A.L.R.2d 1377 (1961). In the instant case, however, Phillips Pet created this predicament with open eyes, having notice of the existence of the two undivided interests at the time that it and its subsidiary, Phillips Pipe, procured inconsistent easements. Defendants actual knowledge of the inconsistency was clearly evidenced by their attempt to clarify Phillips Pet's rights prior to its unilateral installation of an additional pipeline in 1966. Therefore, having purchased the easement from the Turner group with full knowledge that the grantor was purporting to convey title to a multiple-line easement *only* as to an undivided one-half interest in said land, and having acted in reliance upon that grant with full knowledge of its limitations, and after seeking, but having been refused,

an enlargement of the multiple-line grant to cover the Korge undivided one-half interest, defendants have sullied their hands and are now in no position to enjoy the belated and somewhat hypothetical assistance of equity. Cf. *Humphreys-Mexia Co.* v. *Arseneau,* 116 Tex. 603, 297 S.W. 225 (1927); *Frost* v. *Wolf,* 77 Tex. 455, 14 S.W. 440, 443 (1890); *Bartlet* v. *Terrell,* 292 S.W. 273 (Tex.Civ.App. — San Antonio 1927, writ ref'd.).

Accordingly, it is Ordered that:

(1) Judgment for plaintiffs shall be entered on the jury's answers to the aforementioned interrogatories.

(2) The Clerk shall file this instrument and send copies to counsel of record.

DONE at Houston, Texas, this 26th day of July, 1971.

JAMES NOEL
Judge

APPENDIX

VERDICT OF THE JURY

Special Interrogatory No. 1: Do you find from a preponderance of the evidence that Phillips Petroleum Company delayed an unreasonable length of time after construction of the 12" pipe line in 1956 in exercising the rights given it by the Turner grant to lay an additional pipe line on the land in controversy?

Answer: We do not

Special Interrogatory No. 2: Do you find from a preponderance of the evidence that the 1956 pipe line grants from the Turners and the Korges were in fact acquired for the benefit of Phillips Petroleum Company?

Answer: We do

Special Interrogatory No. 3: Do you find from a preponderance of the evidence that the Korge pipe line grant was acquired for the specific purpose of constructing the 1956 pipe line?

Answer: We do

Special Interrogatory No. 4: Do you find from a preponderance of the evidence that the Turner pipe line grant was acquired for the specific purpose of constructing the 1956 pipe line?

Answer: We do

Special Interrogatory No. 5: Do you find from a preponderance of the evidence that Phillips Pipe Line Company and Phillips Petroleum Company obtained the 1956 pipe line grants acting in concert as a single entity?

Answer: We do

Special Interrogatory No. 6: Do you find from a preponderance of the evidence that the Turner and Korge pipe line grants were acquired in 1956 as part of the same transaction?

Answer: We do

Special Interrogatory No. 7: Do you find from a preponderance of the evidence that in acquiring the Korge pipe line grant, Bill Chappell acted as agent for Phillips Petroleum Company as well as for Phillips Pipe Line Company?

Answer: We do

Special Interrogatory No. 8: Do you find from a preponderance of the evidence that the parties to the Korge grant intended to limit the Phillips Pipe Line Company to the construction, maintenance and operation of only one pipe line, namely "a twelve inch (12") pipe line," over the 30 foot right of way described in the Korge grant?

Answer: We do

Special Interrogatory No. 9: Do you find from a preponderance of the evidence that in taking title in its name under the Korge pipe line grant, Phillips Pipe Line Company acted for itself and also on behalf of and for the benefit of Phillips Petroleum Company?

Answer: We do

Special Interrogatory No. 10: What do you find from a preponderance of the evidence was the market value per acre of the land in controversy immediately prior to the construction of the 1966 pipe line? (Answer in dollars and cents per acre)

Answer: $375.00 per acre

Special Interrogatory No. 11: What do you find from the preponderance of the evidence was the market value per acre of the land in controversy immediately after the completion of the 1966 pipe line? (Answer in dollars and cents per acre)

Answer: $350.00 per acre

/s/ Otto F. Krafft
FOREMAN or FORELADY

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

CIVIL ACTION No. 67-G-19

TEXAS MORTGAGE COMPANY,

Plaintiff,

v.

PHILLIPS PETROLEUM COMPANY and
PHILLIPS PIPE LINE COMPANY,

Defendants.

AMENDED JUDGMENT

This action having come on for trial before the Court and a jury, and the jury having entered their verdict consisting of their answers to eleven interrogatories propounded to them by the Court.

It is Ordered and Adjudged, for the reasons enumerated in the Memorandum and Order of July 27, 1971, that the plaintiff recover of the defendants the sum of Four Thousand and no/100 Dollars ($4,000.00), together with pre-judgment interest thereon at the rate of six percent (6%) per annum from the date of filing of this action, September 26, 1966, to the date of this judgment. Post-judgment interest shall accrue only on the judgment debt of Four Thousand and no/100 Dollars ($4,000.00), at the rate of six percent (6%) per annum from the date of this judgment until paid.

Each party shall bear its own costs.

This judgment amends in its entirety and supersedes in all respects that previously entered in this cause. Rule 59(e), Fed. R.Civ.P.

The Clerk shall file this judgment and send copies to all counsel.

DONE at Houston, Texas, this 30th day of November, 1971.

JAMES NOEL
Judge